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80-1909

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE HEPPENSTALL COMPANY,
Petitioner,

v.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDMUND K. TRENT
P.O. Box 2009
Pittsburgh, Pa. 15230
412-288-3144
Counsel of record
for Petitioner

Of counsel:
WILLIAM H. POWDERLY, III

May 8, 1981

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

QUESTIONS PRESENTED

Where individual employees sue their employer to enjoin breach of a pension agreement constituting part of a collective bargaining agreement and for damages, claiming federal jurisdiction under a federal statute pursuant to which a pension plan had been created as an entity subject to suit, and neither the plan nor its successor was made a defendant in the action,

IA. Can a federal court establish a "federal common law of pensions" to require an employer to provide a pension program which, in form and substance, is forbidden by the federal statute exclusively governing such programs, and at the same time rely on the federal statute to support the jurisdiction of the court over a common law action for pension benefits?

IB. Can participants in the plan recover full pension benefits directly from their employer based on a theory of general contract law in contravention of the statutory scheme to place sole liability for benefits on the plan and its successor and without complying with the grievance procedure and arbitration clause of the collective bargaining labor agreement?

II. Can participants in the plan recover pension benefits directly from their employer without complying with the aribitration clause of the collectively-bargained pension agreement?

III. Can participants in the plan recover pension benefits directly from their employer without joining as a party to the action the successor and insurer of the plan, which becomes solely liable to them for pension benefits and which is entitled to partial reimbursement from the employer?

SUPREME COURT RULE 28.1
AS AMENDED OCTOBER 21, 1980

Parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of The Heppenstall Company, a Pennsylvania corporation:

The following corporations, nominees and stock brokers are registered owners of voting stock of The Heppenstall Company:

Alan Wood Steel Company
Bucher & Co.
Butcher & Singer, Inc.
CEDE & Co.
Elm & Company
Glover & MacGregor, Inc.
H.C.S. Corporation
H.C.S. Foundation
Harold Schott Foundation
Hefren & Co.
Hugo Neu Corp.
F. K. Kerper & Co. Pension Plan
Lewco Securities Corp.
Park Corporation
Parker Hunter Incorporated
Sycamore Pharmacy
Tweedy, Browne & Knapp
United Societies of Greek Catholic Religion of U.S.A.

The Park Corporation, of South Charleston, West Virginia, a substantial owner of Hepppenstall's voting stock, has two partially owned subsidiaries, Bridalveil Lumber Co. and Ampac Forest Products Co., both of Portland, Oregon.

Prior to December 12, 1978, Alpha Sierra Corporation, an affiliate of Tishkin Products, Inc., was a substan-

tial owner of Heppenstall's voting stock, and prior to March 5, 1979, Blue Diamond Coal Company was a substantial owner of such stock.

Petitioner has no knowledge of any corporate beneficial owner not included in the above list, except that it has been informed that Old Republic Insurance Company, a partially owned (99.7%) subsidiary of Old Republic International Corp., is the beneficial owner of shares registered in the name of CEDE & Co.

PARTIES TO PROCEEDING IN COURT OF APPEALS

In addition to the parties named in the caption of the case in this Court, the Pension Benefit Guaranty Corporation, a federal body corporate, filed a brief as amicus curiae in the Court of Appeals at the request of that court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Heppenstall Company, a Pennsylvania corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 10, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit filed December 10, 1980 affirming the District Court is set forth in Appendix A hereto, page 1a.

The opinion of the United States District Court for the Western District of Pennsylvania (Dumbauld, D.J.) filed August 8, 1979 denying defendant's motion to dismiss the complaint or, in the alternative, to refer the issue to arbitration, reported in 473 F.Supp. 783, is set forth in Appendix B hereto, page 14a.

No opinions were filed relating to the District Court's order entered April 1, 1980 denying defendant's motion for reconsideration and to dismiss and granting plaintiffs' motion for partial summary judgment (set forth in Appendix C hereto, page 19a), and his order entered April 23, 1980 supplementing the orders of August 8, 1979 and April 1, 1980 to permit interlocutory appeals (set forth in Appendix D hereto, page 22a), except to the extent that the orders themselves contain the opinions of the district judge.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed (24a) was dated and entered December 10, 1980. The order of the Court of Appeals denying the petition for rehearing (filed December 23, 1980) (26a) was dated and entered January 9, 1981. By an order of Mr. Justice Brennan dated March 24, 1981, the time for filing a petition for certiorari was extended to and including May 8, 1981.

Jurisdiction to review the judgment of the Court of Appeals is conferred on the Supreme Court by the Act of Congress of June 25, 1948, c.646 (62 Stat. 869), section 1254(1) (28 U.S.C. §1254(1)).

STATUTES INVOLVED

The case involves the Employee Retirement Income Security Act of September 2, 1974, Pub. L. 93-406 (88 Stat. 832) as amended (29 U.S.C. 1001 ff.), commonly called ERISA, and parts of sections 401, 411, 412 and 501 of the Internal Revenue Code of August 16, 1954 (68A Stat. 5), referred to as the Code, as amended by ERISA (26 U.S.C. §§401, 411, 412, 501). The sections of those statutes which are involved in the present action are listed in the contents of the appendix (pp.i-iii) and are set out verbatim in appendices G (pp. 28a-49a) and H (pp.50a-52a). Section 412 appears at page 43a.

STATEMENT OF THE CASE

Plaintiffs, retired hourly-paid employees of petitioner, defendant-appellant below, The Heppenstall Company, at its Pittsburgh plant, which had ceased operations on May 31, 1979, filed a civil action on June 13, 1979 in the District Court for the Western District of Pennsylvania against defendant company under ERISA, seeking in count I an order enjoining defendant from failing to pay them pension benefits in accordance with the pension agreement made in September 1977, but effective August 16, 1976, which was part of the collective bargaining labor agreement between the company and the United Steelworkers of America, and for damages suffered by plaintiffs for such alleged breach. Count II, which was not pressed below, requested an order enjoining defendant from failing to make contributions to the plan.

Jurisdiction of the district court was invoked under section 502(e) of ERISA (29 U.S.C . 1132(e))(39a). Defendant moved to dismiss for lack of subject matter jurisdiction or in the alternative to stay the proceedings pending arbitration under the arbitration clauses of the pension agreement and of the collective bargaining agreement. On August 8, 1979 the District Court (Dumbauld, D.J.) denied (18a) defendant's motion to dismiss or for arbitration, stating that plaintiffs' action was a suit on "defendant's contractual agreement, in what would have been an action of *indebitatus assumpsit* at common law." (473 F.Supp. 783, 786)(14a at 17a).

On August 31, 1979 defendant moved the district court for reconsideration, on the ground that the same district judge had entered an order in a cognate case on June 28, 1979 terminating the pension plan as of that

date,[1] thus holding that the pension agreement created a pension plan subject to all the provisions of ERISA. In the alternative, defendant moved for a stay pending the determination of an appeal from that order. As an additional ground for reconsideration defendant asserted that plaintiffs themselves had recently demanded arbitration of their claims pursuant to the pension agreement and pursuant to the collective bargaining agreement, under its grievance procedure.

On November 2, 1979 plaintiffs filed a motion for summary judgment in the present action,[2] and on January 17, 1980 defendant filed a motion to dismiss the amended complaint for failure to join an indispensable party, for failure to state a claim upon which relief could be granted, and on the ground that plaintiffs' claims had been fully litigated in the cognate case. In the alternative, defendant asked leave to file an answer to the amended complaint and to file a third-party complaint against the plan, the plan's trustee and/or against the Pension Benefit Guaranty Corporation (PBGC).

On April 1, 1980 the District Court denied defendant's motion for reconsideration and to dismiss and granted plaintiffs' motion for summary judgment, which he characterized as a partial summary judgment, and entered judgment "against the defendant for such sums as each plaintiff individually is entitled to pursuant to the terms of the applicable contracts providing for pension benefits;" (20a). Defendant duly appealed, both as of right and under 28 U.S.C. §1292(b).

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1. As the result of the order of the Court of Appeals in the cognate case, *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980), the termination date was, after remand, changed to May 31, 1979. Pension Benefit Guaranty Corp. has taken an appeal.

2. Plaintiffs also moved to amend the complaint for leave to file as a class action, but later withdrew that motion.

The Court of Appeals for the Third Circuit, pursuant to an opinion by Circuit Judge Gibbons, joined by Circuit Judge Rosenn and District Judge Hannum, on December 10, 1980 affirmed the District Court (1a,24a) and appellant's timely petition for rehearing was denied on January 9, 1981 (26a). This Petition for Writ of Certiorari was filed on May 8, 1981.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Plaintiffs invoked the jurisdiction of the United States District Court for the Western District of Pennsylvania pursuant to section 502(a) of ERISA (29 U.S.C. §1132(a))(3a), set forth in Appendix G hereto at page 39a. Plaintiffs are all citizens of the Commonwealth of Pennsylvania residing in Allegheny County, and defendant is a Pennsylvania corporation with its principal place of business in Allegheny County. Allegheny County is in the Western District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Third Circuit has rendered a decision in conflict with decisions of the Supreme Court of the United States and with decisions of the Courts of Appeals for the Sixth, Seventh, Eighth and Ninth Circuits on the same matters, as will be pointed out below.

The Court of Appeals for the Third Circuit has decided a number of important questions relating to the construction of a federal statute (ERISA) which have not been, but should be, settled by your Honorable Court, because the issues presented with respect to petitioner's pension plan involve the fundmental precepts of ERISA and will affect a vast number of pension plans in use in

industry throughout the entire country, and such questions will certainly arise in future litigation[3]. A decision on the fundamental issues raised by the present petition will be of great use, providing guidance and reducing or eliminating the necessity for litigation. The most important of those questions, as to which petitioner believes the courts below fell into error, will be discussed in petitioner's argument which follows.

The decision below, imposing on employers large unforeseen additional liabilities for unfunded pensions, if permitted to stand will seriously, if not disastrously, affect the financial stability of many American corporations, large and small. The universal belief in the financial world, as shown by commentators,[4] is that an employer's maximum liability for unfunded pension benefits is 30 percent of its net worth. The decision below would remove all limits from employers' liability by establishing pension programs that are outside ERISA, in direct derogation of the will of Congress.

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3. Additional litigation is certain because of the "almost incomprehensible vagueness" of the statutory provisions relating to the role of participant employees in involuntary termination proceedings: *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, supra (p. 4, fn. 1), 633 F.2d 293 at p. 302.

4. E.g., Scott, in Pensions & Investments, July 21, 1980 (Crain Communications, Inc., Chicago).

ARGUMENT

I. PARTICIPANTS IN A PENSION PLAN HAVE NO RIGHT OF ACTION TO RECOVER BENEFITS DIRECTLY FROM THEIR FORMER EMPLOYER

A. *ERISA applies exclusively to all acts by employers engaged in or affecting interstate commerce which provide for the payment of a pension or other form of deferred compensation to a group of employees upon or after termination of their employment*

By definition,[5] "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program —(A) provides retirement income to employees, or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond," is subject to ERISA. That statute is applicable to any such "pension plan" established or maintained by any employer engaged in interstate commerce or in any industry or activity affecting interstate commerce.[6]

Although various succeeding parts of the statute either exclude in toto certain types of program which would fall within the broad statutory definition, as well as programs maintained by certain classes of employer,[7] or exclude other specified types of program from the operation of specific sections,[8] none of these exceptions or any other exception is applicable to the pension pro-

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5. ERISA section 3, subsection (2), 29 U.S.C. §1002(2)(30a).

6. Sections 4(a)(32a) and 3, subsection 11(30a), 29 U.S.C. §1003(a) and §1002(11)(33a).

7. Section 4(b), 29 U.S.C. §1003(b)(33a).

8. Sections 201 and 301, 29 U.S.C. §1051, 1081(33a,35a).

gram established by or maintained under the agreement which forms the foundation of the present action. Therefore that agreement, and any program functioning under or by reason of it for providing pension benefits, is a pension plan governed by all sections of ERISA, including those amending the Internal Revenue Code.[9]

Thus Congress intended ERISA to be a comprehensive and all-embracing statute governing all private pension programs[10] except those specifically excluded, making it the exclusive statute applicable to such programs and pre-empting all control of this subject by the states.[11] Both the District Court and the Court of Appeals attempted to bifurcate the pension agreement and its concomitant retirement program so that the program was both covered by ERISA and not covered by ERISA, and yet the two courts found ERISA applicable to the employee's rights in both instances. In so doing those courts have nullified the basic tenets of ERISA. This fundamental misconception of the effect of ERISA is responsible for the ensuing errors of the courts below.

B. *Petitioner's pension plan is governed by ERISA*

Section 1016 of ERISA amended Code section 401 to provide that an employer's pension plan would qualify for favorable tax treatment under the Code only if it conformed to and complied with the requirements of the Code as amended by ERISA.[12] Any pension plan established or maintained by an employer engaged in interstate commerce which qualifies under the Code as amended is therefore governed by ERISA unless specifically excluded.

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9. Sections 1011-1017, 1021-1023, 1031-1034, 1041, 1051-1054(42a-43a).

10. Section 2, 29 U.S.C. §1001(30a).

11. Section 514, 29 U.S.C. §1144(41a).

12. Code section 401(a), 26 U.S.C. §401(50a).

The pension agreement portion of the collective bargaining agreement effective August 16, 1976 between plaintiffs' union and petitioner obligated petitioner to provide pension benefits for its employees, but only on condition that the trust from which the pension benefits were to be paid would be "exempt under the applicable provisions of the Internal Revenue Code." (section 1.3,75a). The pension agreement therefore required petitioner to provide pension benefits for its employees, but only pursuant to a pension plan which would qualify under the Code and be governed by ERISA.

The pension agreement, constituting the pension plan involved here, would not, in the form in which was first agreed to (75a), have complied with the Code as amended by ERISA, and thus the trust would not have been exempt under the Code. The parties therefore amended the pension agreement (76a) so that the trust under the plan complied with the Code's requirements for exemption, and the plan remained qualified.[13] As part of the amendment required by the Internal Revenue Service (I.R.S.), section 10.2 of the agreement was supplemented by a provision which stated that if the plan established by the agreement were terminated, the participants' rights in the pension benefits would become fully vested and nonforfeitable, to the extent those benefits were funded (76a).

ERISA empowers PBGC, the statutory guarantor of the trust fund created by the plan, to terminate pension plans.[14] On December 18, 1978 PBGC filed an action[15] to

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13. This amendment brought the plan into compliance with Code section 411(d)(3) as added by ERISA (26 U.S.C. §411(d)(3))(51a).

14. ERISA section 4042, 29 U.S.C. §1342(46a). Were it not for this statutory provision, petitioner's pension plan could not have been terminated until after the pension agreement's expiration date, December 31, 1979 (Pension Agreement §10.12): *International Union, Etc. v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974).

15. The cognate action referred to above (p. 4, fn. 1).

terminate the pension plan created by the pension agreement, and on June 28, 1979 the court ordered its termination. (pp. 3-4, and fn. 1). Having done this, the District Court held on August 8, 1979 that under the terms of the same pension agreement plaintiff participants were contractually entitled to benefits and that they could fully recover them from petitioner, their former employer, without resorting to the plan, the assets in the plan or PBGC. The Court of Appeals reached the same result, but based their opinion on a federal common law of pensions.

The District Court found petitioner directly liable to its former employees from the language of section 1.3 of the pension agreement (75a), in which petitioner had agreed to provide the pension benefits set forth in the agreement. In so doing, the Court ignored the condition (imposed in the very same sentence) that petitioner was obligated to provide such benefits only if the trust[16] under the pension plan was exempt under the Code, and ignored the fact that the trust had been amended to comply with the Code and that the amendment limited the participants' rights to benefits which had been funded.

The District Court brushed aside the amendment which the IRS had required in order to fulfil the condition precedent for qualification of the plan, saying that it had "no application to plaintiffs whose pension rights

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16. The District Court held that petitioner's contractual obligations to plaintiffs constituted a pension plan (19a), but totally disregarded the statutory mandate of section 403(a) (29 U.S.C. 1103) (38a), requiring that all pension plan assets must be held in trust. Thus according to the logic of the District Court, an employer's entire assets are trust assets for the benefit of plan participants, due to the employer's direct liability for payment of benefits. The Court of Appeals avoided the requirement of section 403(a) by holding plaintiff's claims to be federal common law contract claims against their employer and not claims for benefits under a "pension plan" (8a).

had previously been consummated upon actual retirement." (17a). This would destroy the plan's qualification under the Code, something the Court had no right to do. It also constituted an improper amendment of the agreement by judicial fiat, because the document nowhere contains any such limiting or exclusionary language. The pension agreement states that in the event "this Agreement"—meaning the pension plan created by the agreement—"is terminated in whole or in part,[17] the rights of any participant with respect to whom such termination shall have occurred shall . . . be fully vested and nonforfeitable . . . to the extent those benefits are funded by the applicable assets of the trust fund."(76a) This plainly included all participants as to whom the plan was terminated. The agreement contains no language whatever limiting it to participants who had actually retired or otherwise terminated their employment with vested or nonforfeitable rights; nothing else in the record supports any such limitation; and ERISA does not set up any classification of employees, some with and some without a direct right of action against their employer.

The District Court also disregarded the language of the statute on which he relied for federal jurisdiction. Section 502, subsection (a)(1)(B) of ERISA (29 U.S.C. §1132(a)(1)(B)) permits a participant[18] to bring a civil action "to recover benefits due him under the terms of his plan . . ."(39a). Subsection (d)(1) states that "An employee benefit plan[19] may . . . be sued under this subchapter as an entity,"(40a) and, in subparagraph (2), states that "Any money judgment under this subchapter

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17. Partial termination would occur, for example, when an employer closed one of the several plants covered by a pension agreement.

18. Defined in section 3(7), 29 U.S.C. §1002(7)(30a).

19. Defined in section 3(3), 29 U.S.C. §1002(3)(30a).

against an employee benefit plan shall be enforceable only against the plan as an entity and not against any other person..." (with an exception not here involved)(40a). These provisions show that the right of action given a participant by section 502 was intended to be limited to an action against the plan, and that the person having such right of action, the participant, was someone eligible to receive a benefit from an employee benefit plan. Nowhere does ERISA establish a private contract right of action for benefits against an employer.

C. *An employee cannot recover pension benefits directly from his employer*

All employee pension plans subject to ERISA, unless exempted, are required to be funded,[20] and all pension plans qualified under the Internal Revenue Code must be funded.[21] An unfunded plan, known as a pay-as-you-go plan, would not qualify for treasury approval either before or after ERISA. Congress intended ERISA to outlaw such plans,[22] and section 3(31) did so. (29 U.S.C. §1002(31))(32a).

The contract provisions of section 1.3 of the pension agreement in suit, when construed as not being conditioned on obtaining I.R.S. approval, would not (in this case) provide pension rights which are funded. Thus the contract would not be subject to ERISA. On the contrary, it would be prohibited by ERISA. The District Court apparently realized this when he decided that plaintiffs were suing on defendant's contractual agreement, in

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20. ERISA sections 301(a) and 302, 29 U.S.C. §§1081(a) and 1082 (35a,36a).

21. Code section 412 (43a), 26 U.S.C. §412, and I.R.S. Pub. 778 (2-72) part 2(b)(53a); Rev.Rul. 71-91, 1971-1 C.B. 116(52a).

22. S. report No. 93-127 to accompany S.4 (58a, 59a). "It is within the contemplation of the Committee that so-called 'pay-as-you-go' or 'terminal funded' plans are precluded under the requirements of this section." (59a).

what would have been an action of *indebitatus assumpsit* at common law—i.e., that the suit was not based on petitioner's pension plan at all. Yet he had held (on June 28, 1979) in the cognate case (pp. 3-4 and fn. 1, supra) that the pension plan provided for in the agreement was subject to ERISA, because only by reason of ERISA was PBGC empowered to terminate qualified pension plans and obligated to insure pension benefits.

The District Court thus held in the case at bar that the pension agreement in suit created and imposed on petitioner two obligations: (1) to provide a plan for pension benefits under ERISA, and (2) to provide exactly the same pension benefits outside ERISA. The Court found the basis for these two different obligations in a single provision of the pension agreement, section 1.3, by saying that the pension agreement nowhere limited the benefits for which defendant was liable to those derivable from the assets of the trust fund (16a-17a). In so doing the Court erroneously disregarded the additional language of section 10.2 on the ground that such language had been required by the I.R.S. merely for qualification and did not affect the contract claim.

The Court of Appeals took a similar approach. Judge Gibbons found a limitation to petitioner's funding obligation in the amendatory language which the I.R.S had required to be added to section 10.2 of the pension agreement, saying that the obligation to fund "in accordance . . . with the provisions of Section 8 of this Agreement" (76a) excused any and all funding whatever because the language of section 8 was permissive only and "does not oblige the employer to fund any trust" (5a). Judge Gibbons completely ignored the entire purport of ERISA and the express requirement of section 412 of the Code (26 U.S.C. §412)(43a) imposing minimum funding standards on all qualified pension plans.

In attempted answer to petitioner's contention that its liability on termination of an insufficiently funded pension plan was limited to 30 percent of its net worth payable to PBGC pursuant to section 4062 of ERISA (29 U.S.C. §§1362)(48a), Judge Gibbons said that that section did not "address pension benefits directly recoverable from the employer"(9a). This was correct, because under ERISA such an obligation creates a "pension plan," and under ERISA no pension benefits can be directly recoverable from the employer; they can be recovered only from "pension plans" (which must be funded).[23]

In support of his opinion Judge Gibbons cited the decisions of two federal district courts, *In re Alan Wood Steel Co.*, 212 BNA Pension Reporter D-1 (E.D.Pa. 1978), and *In the Matter of M & M Transportation Company*, 288 BNA Bankruptcy Reporter D-4 (S.D.N.Y. 1980)(10a). The first of those cases is not in point because the two plans there involved were not terminated and the employer, having created a fund available to all its unsecured creditors, did not care how it was divided among them. It therefore did not contest the claims of the hourly-paid employees against that fund.

In the M & M case Bankruptcy Judge Babbitt held that the employees were not entitled to recover from the debtor's assets, but on appeal District Judge Werker, although apparently agreeing that Judge Babbitt's decision comported with congressional intent, nevertheless reversed on the ground that Congress could not have intended that an employer with net assets was not subject to a liability to its employees, in addition to its 30 percent liability to PBGC.

The committee reports and statements of the legislators in support of the bills which resulted in the

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23. Footnote 5, supra. p. 7.

enactment of ERISA[24] make it abundantly clear that Congress *did* intend to limit the liability of employers in exactly the manner urged by M&M Transportation Company and found by Bankruptcy Judge Babbit. Prior to ERISA, employers usually limited their liability on termination of their pension plans. In the early drafts of ERISA Congress imposed 100 percent liability on the employers to reimburse PBGC (57a). Because this was felt to be too severe, the 100 percent reimbursement requirement was reduced in later drafts, first to 50 percent (60a,62a,67a), and finally to 30 percent (64a,65a, 69a), where it remains as section 4062 of ERISA (29 U.S.C. §1362)(69a,48a). Congress correspondingly reduced the benefits which PBGC was obligated to pay to participants in terminated plans.

Thus Congress intended to limit employers' liability, not only to PBGC, but also to any other pension benefit claimant. This is proved by the statements to that effect in House Report No. 93-533.[25]

Except for Judge Werker's decision in the M&M case, supra (p. 14) (and Judge Dumbauld's decision in the case at bar), all the district courts which have addressed the question of whether an employer is directly liable to his employees for benefits under ERISA have answered squarely in the negative.[26] In holding to the contrary, Judge Werker (and Judge Dumbauld and the Court of Appeals for the Third Circuit) fell into the error of im-

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24. Appendix I, pp. 55a-70a.

25. Appendix I, pp. 65a-67a.

26. *Lazur v. United Mine Wkrs. of America*, 471 F.Supp. 114 (D.D.C. 1979); *Nefferdorf v. American Chain & Cable Co.*, No. 78 M-0822 (ND.Ala. 1979); *King v. Allis-Chalmers Corp.*, No. 77-883 (W.D.Pa. 1979); *Barrett v. Thorofare Markets, Inc.*, 452 F.Supp. 880 (W.D.Pa. 1978); *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565, 568 (E.D.Tenn. 1977).

posing liability for pension benefits on an entity other than a "pension plan."

To carry out the underlying purpose of ERISA—ensuring the security of workers' pensions (28a)—provision was made for insurance in the event a plan is terminated without sufficient assets to pay the promised benefits.[27] This was accomplished by the creation of PBGC, which insures, upon termination of a qualified defined benefit pension plan, all nonforfeitable pension rights (other than those becoming nonforfeitable by reason of the plan's termination) up to a maximum amount specified in the statute, and has a limited claim against the employer.[28] The insurance obligation becomes operative upon termination of the plan.[29] PBGC becomes liable for the present value of the benefits to be paid to the participants to the extent the assets of the plan are insufficient, for which PBGC has the right to be reimbursed from the employer's assets, up to 30 percent of the employer's net worth.[30]

The District Court in the case at bar held that whatever recovery plaintiffs obtained from defendant would be diminished by such amounts, if any, as might be paid by PBGC (14a). Neither the statute nor the pension agreement in suit provides for this—another indication that direct liability of defendant to plaintiffs was not intended.

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27. Title IV, sections 4001-4082, applicable parts, 29 U.S.C. §§1301-1381, 26 U.S.C. §401 (43a-49a,50a).

28. ERISA sections 4002, 4022, 4062, 29 U.S.C. §1302, 1322, 1362 (44a,46a,48a).

29. Section 4022, 29 U.S.C. §1322 (46a).

30. Section 4062(b)(2), 29 U.S.C. §1362(b)(2)(48a-49a).

The Court of Appeals (11a) based direct liability of an employer to its former employees on language in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 385 (1980). In that case Nachman Corp. had, prior to the enactment of ERISA, established a pension plan which expressly disclaimed direct liability to employees for any funding deficiency of the plan.

The Court of Appeals in the present case reasoned that the employer's obligation to reimburse PBGC in an amount up to 30 percent of the employer's net worth "demonstrated Congress' intention to preserve employers' 'right to place a contractual limit on their direct liability to their employees.'" (12a). The Court of Appeals concluded that if the employer could limit direct liability, direct liability must persist in the absence of limitation (13a).

The Court of Appeals misunderstood the *Nachman* opinion, overlooking the fact that the pension agreement in that case was entered into before ERISA was enacted and that the Nachman plan was terminated before many of the provisions of ERISA, including the funding requirements, became effective. Nachman Corp. naturally wished to limit its direct liability under state laws, which were applicable to pension contracts prior to ERISA: *Malone v. White Motor Corp.*, 435 U.S. 497 (1978)[31]. Nachman Corp. expressly did so under state law when it established a funded pension plan and limited its pension obligation to the amounts it contributed prior to termination of the plan, thereby disclaiming any direct liability to participants in the plan.

The plan of Heppenstall Company, petitioner at bar, was agreed to in final form after ERISA became effective. There was therefore no need to disclaim direct lia-

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31. All state laws pertaining directly or indirectly to pension plans have been preempted by ERISA: section 514 (29 U.S.C.§1144)(41a).

bility for benefits, because ERISA itself, being all-inclusive and not providing for direct liability, precluded it. ERISA established "pension plans" as the only entities liable for pension benefits.

This conclusion is confirmed by the Supreme Court's analysis of the employer's liability in the *Nachman* case. Mr. Justice Stevens points out that the 30 percent limitation on the employer's obligation to reimburse PBGC (section 4062(b)(2), 29 U.S.C. §1362(b)(2))(48a) "plainly contemplates the situation in which the employer has disclaimed direct liability; for if the employer were directly liable to the employees for the full amount of any funding deficiency, the 30% limitation would serve no useful purpose." (446 U.S. at p. 380). This reasoning, applicable to a plan created prior to the enactment of ERISA in which the employer has expressly disclaimed direct liability, applies with equal force to a post-ERISA plan where ERISA itself has barred the employer's direct liability to employees, taking the place of the express disclaimer made by Nachman Corp. If ERISA permitted direct liability to employees to the extent of funding deficiencies, "the 30% limitation would serve no useful purpose."

The 30% limit performs a useful function. It imposes a compromise, or partial, obligation on the employer for deficiencies in the assets of the plan, so that the employer, instead of being able to disclaim all liability for shortages in the plan's assets, remains liable for part of them. The employer's liability is to PBGC, which in turn is liable to the participants, though in most cases in a larger amount. Thus when the assets of a plan are insufficient to pay the participants' nonforfeitable benefits in full, and the shortage exceeds 30% of the employer's net worth, the Act has divided the loss among the employer (up to 30% of its net worth), PBGC (for an additional amount above its 30% claim), and the participants (to the

extent their nonforfeitable rights are not paid in full). Congress having thus allocated the loss, the courts should not try to rearrange it. In so doing, the District Court and the Court of Appeals fell into error.

The creation of a common law right of action in the employees apart from and outside ERISA, permitting them to disregard the pension plan and recover pension benefits directly from their employer, constituted the principal error of both courts below. The federal courts derive their jurisdiction only from federal statutes. The fact that a federal statute does not expressly forbid the creation of a common law right does not constitute the necessary affirmative provision conferring that power on such courts. In civil matters between private citizens a federal common law arises only from, and only in relation to, some federal statute *(Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173 (1942)). Since ERISA provided no such right, it follows that Heppenstall's employees had no direct right of action against their employer for pension benefits under a federal common law.

D. *If employees have a claim directly against their employer for pension benefits, the collective bargaining agreement between their union and petitioner requires the dispute to be settled by arbitration*

The only federal common law right plaintiffs could possibly have would therefore be a right tied to some federal statute. Other than ERISA, the only federal statute available to them is the National Labor Relations Act of July 5, 1935, c.372 (49 Stat. 449) as amended by the Labor Management Relations Act of June 23, 1947, c.120 (71 Stat. 136, 29 U.S.C. §151 ff.).

As the District Court stated (15a,fn.1), the pension agreement in suit was a collectively bargained labor agreement. It was part of the overall collective bargain-

ing labor-management agreement dated August 25, 1975[32] (71a) and was therefore subject to the arbitration clause of that agreement. That agreement defined a grievance as a dispute over any claim or obligation covered by the agreement and specified that the parties intend to "set forth their agreement on rates of pay, hours of work and other conditions of employment."(71a) The "other conditions of employment" include retirement and pension plans: *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948), cert. den. as to pension issue 336 U.S. 960 (see 339 U.S. 382 at pp. 384, 386-7).

An arbitration clause in a collective bargaining agreement requires arbitration of a controversy over severance pay or pension benefits claimed by former employees: *Republic Steel v. Maddox*, 379 U.S. 650 (1965); *Local 589, Intern. Ladies Garment v. Kelwood Co.*, 592 F.2d 1008 (8th Cir. 1979); *United Steelwkrs. of Amer. v. General Steel Indus. Inc.*, 499 F.2d 215 (8th Cir.1974). Plaintiffs therefore have no direct right of action against their former employer. They must follow the applicable procedure for resolving grievances.

Judge Gibbons agreed that federal common law can be derived only from a federal statute, saying that the employees' contract claim against the employer was not only under the federal common law of pension plans, but also under the federal common law of labor-management contracts (8a). In holding that plaintiffs were entitled to recover in a direct action against their employer, Judge Gibbons completely overlooked the grievance and arbitration provisions of the labor-management agreement

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32. Attached to that overall labor agreement is a "Memorandum of Understanding re: Pensions," providing for changes in the pension benefits.(73a)

between plaintiffs and petitioner, the overall collective bargaining agreement dated August 25, 1975 (71a, 72a). In failing to enforce them, he violated the universal policy of the courts to enforce grievance and arbitration requirements in labor contracts. This policy is subject to exception only when the record contains "the most forceful evidence of a purpose to exclude the claim from arbitration."[33] No such evidence is found in the present record. On the contrary, plaintiffs themselves recognized their obligation to comply with the contractual provisions for settling disputes by filing grievance petitions raising the very question involved in the present petition. Judge Gibbons' holding was in direct conflict with the decisions of the Supreme Court in the cited cases (fn.33) and in the *Maddox* case and with the decisions of the Court of Appeals for the Eighth Circuit in the *Kelwood* and *General Steel Industries* cases.

II. THE PARTICIPANTS ARE REQUIRED TO SUBMIT THEIR CLAIMS TO ARBITRATION UNDER THE PENSION AGREEMENT

Plaintiffs have sued under the pension agreement between petitioner and plaintiffs' bargaining representative, the United Steelworkers of America. The arbitration clause of that agreement, section 7.1 (15a), provides for arbitration of any controversy relating to claims for pension benefits. The District Court nevertheless held the arbitration clause inapplicable, on the ground that plaintiffs were not applicants for pensions and that the amounts of their pensions were not in dispute.

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33. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 at p. 585 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960); *Collyer Insulated Wire*, 192 NLRB 837 (1971). The first three of these cases are those referred to by Judge Dumbauld as the "Steel Trilogy."(14a).

Plaintiffs are applicants for pensions. An "applicant" is defined as "one who applies for something", and "apply" as "to make an appeal or a request esp. formally and often in writing and usu. for something of benefit to oneself." (Webster's Third International Dictionary, Unabridged, Merriam, Springfield, Mass. 1961). By filing the present action plaintiffs formally applied to petitioner for pension moneys to be paid to them by petitioner. Plaintiffs are therefore applicants for pensions.

The amounts of the pensions claimed by plaintiffs are also in dispute. They contend that they are entitled to certain dollar amounts from petitioner; petitioner disputes that they are entitled to as much as they claim and, further, contends that it is not obligated to pay them any amounts at all. The amounts of their pensions are thus in dispute. The pension agreement requires such dispute to be settled by arbitration.

Arbitration clauses in pension agreements must be obeyed: *Amato v Bernard*, 618 F. 2d 559 (9th Cir. 1980); *Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645 (7th Cir. 1980). In refusing to enforce the arbitration clause in the pension agreement in suit, the courts below rendered a decision in conflict with the decisions of the Courts of Appeals of the Seventh and Ninth Circuits.

III. THE SUCCESSOR TO THE PLAN ITSELF (A STATUTORY ENTITY) AND THE INSURER SHOULD HAVE BEEN MADE PARTIES TO THE ACTION

F.R.C.P. 19(a) provides that a person subject to service of process " shall be joined as a party . . . if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest . . . and . . . disposition of the action in his absence may (i) . . . impair or impede his ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double . . . obligations . . . ". A "person described in subdivision (a)(1)-(2)" of the rule is, according to subdivision (b), "regarded as indispensable."

ERISA expressly provides that a participant in a pension plan who is denied benefits to which he is entitled may sue the plan as an entity,[34] and the few cases in which the point has arisen have held that the plan is a necessary party: *Hill v. Iron Workers Local Union No. 25*, 520 F.2d 40 (6th Cir. 1975), and *Carter v. Montgomery Ward & Co.*, (supra, p. 15, fn. 26), 76 F.R.D. 565 (E.D. Tenn. 1977). The latter case also held (p. 568) that the employer was not a proper party.

Both of the above requirements of rule 19(a) for joining as a party to the present action the Heppenstall plan, or rather PBGC as successor in interest to the plan (ERISA section 4042, 29 U.S.C. §1342)(46a-47a) and as insurer of the plan (ERISA section 4022, 29 U.S.C. §1322)(46a), are present in the case at bar. In its absence complete relief cannot be accorded among plaintiffs and petitioner, because plaintiffs will not be able to recover what the plan and PBGC owe them under section 4022 (29 U.S.C. §1322)(46a), PBGC will not be able to recover what petitioner owes it under section 4062(b) (29 U.S.C. §1362(b))(48a-49a), and petitioner will be unable to compel PBGC to pay what it owes plaintiffs, in order to diminish petitioner's liability to them as required by the District Court's ruling (14a). If petitioner pays plaintiffs and PBGC also pays them and reimburses itself from 30% of petitioner's net assets, petitioner will be subject to the risk of paying twice.

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34. Section 502(d)(1), 29 U.S.C. §1132(d)(1)(39a-40a).

Failure to join an indispensable party is a defect so basic that it can be raised at any time, even on appeal: 3A Moore's Federal Practice ¶19.19, citing many cases (fn. 9, 10, 10a, 11, on p. 19-347). Petitioner at bar raised this point in the district court. In affirming the refusal of petitioner's motion to join PBGC as successor trustee under Heppenstall's plan, the court below rendered a decision in conflict with that of the Court of Appeals for the Sixth Circuit in the *Hill* case, supra (520 F.2d 40).

CONCLUSION

The need, not only by petitioner at bar but also by all the other employers in the country who have provided pension plans for their employees which may have to be terminated when the employers sustain economic reverses, for an authoritative determination of whether or not they will be liable for unfunded pension benefits in excess of 30% of their net worth is the principal reason for granting certiorari in the present case. The writ should be directed to issue.

Respectfully submitted,
Edmund K. Trent

Reed Smith Shaw & McClay
747 Union Trust Building
P.O. Box 2009
Pittsburgh, Pennsylvania 15230

Counsel of record for petitioner

Of counsel:

William H. Powderly III